Supreme Court of the United States

October Term, 1976
No. 76-549

SKIL CORPORATION,
Petitioner,

vs.

MILLERS FALLS COMPANY, ROCKWELL MANUFACTURING COMPANY, WEN PRODUCTS, INC., and LUCERNE PRODUCTS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

REESE DILL
HENRY J. ZETZER
MERKEL, CAMPBELL, DILL & ZETZER
2150 Illuminating Building
Cleveland, Ohio 44113
(216) 523-1500

RICHARD J. EGAN
BALDWIN, EGAN, WALLING & FETZER
1430 Keith Building
Cleveland, Ohio 44115
Attorneys for Respondents

Of Counsel:
JAMES VAN SANTEN
HILL, GROSS, SIMPSON, VAN SANTEN, STEDMAN, CHIARA & SIMPSON
70th Floor Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(*Counsel for Petitioner on Inside Cover*)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

CLARENCE J. FLEMING
McDOUGALL, HERSH & SCOTT
135 South LaSalle Street
Chicago, Illinois 60603
(312) 346-0338
Attorney for Petitioner

Of Counsel:

MARC L. SWARTZBAUGH
JONES, DAY, REAVIS & POGUE
1700 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939

CHARLES M. CARTER
5033 North Elston Avenue
Chicago, Illinois 60603
(312) 286-2000

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BRIEF IN OPPOSITION

Since the Petition for Writ of Certiorari sets forth THE OPINIONS BELOW, JURISDICTION, STATUTE INVOLVED, and QUESTIONS PRESENTED, these items are not repeated herein. However, because the STATEMENT OF THE CASE as set forth in the Petition is so inadequate as to be misleading, we are constrained to restate this section more fully.

STATEMENT OF THE CASE

Because the amended order of the District Court from which appeal was taken consolidates Case No. C74-121, which was originally filed in the District Court for the Northern District of Illinois as Case No. 72 C 2854, with an earlier case pending in the District Court for the Northern District of Ohio, Eastern Division under Case No. C69-461 (both cases involving the same patents allegedly infringed); it is necessary to trace the history of this litigation from its inception.

Skil is the owner of two patents viz. Gawron Patent No. 3,209,228 and Frenzel Patent No. 3,260,287. Lucerne owns Matthews Reissue Patent 26,267. All of these patents relate to switch devices used in portable electric tools.

The first PATENT INFRINGEMENT suit was filed by Lucerne against The Black & Decker Mfg. Co. in the Northern District of Ohio on October 11, 1967 as Case No. C67-723 alleging infringement of the Matthews patent. Arrow-Hart & Hegeman Electric Co., as manufacturer-supplier, was substituted for Black & Decker, and it filed a waiver of venue.

Ten months later Skil filed suit against Lucerne in the Illinois District Court on July 31, 1968 under Case No. 68 C 1290 for license royalties claimed under Gawron and Frenzel; to which Lucerne filed its Answer and Counterclaim on October 16, 1968, alleging misuse of Gawron and that Gawron had been adjudicated invalid in Civil Action 66 C 267 *Skil Corporation v. Sears Roebuck & Co.* (7th Circuit), and further alleging that Skil was infringing Matthews by purchasing switches made by Arrow-Hart. Skill replied to the Counterclaim asking that Matthews be declared invalid and misused. Arrow-Hart as

Skil's supplier intervened to defend against Lucerne's Counterclaim. In the meantime Judge Will granted summary judgment in favor of Skil and against Lucerne on two counts, holding that Lucerne as Skil's licensee could not challenge the validity of its licensor's Gawron and Frenzel patents.

Thereafter, on June 6, 1969, pursuant to a motion by Skil for leave to add another count to its complaint charging infringement of Frenzel, and on Arrow-Hart's motion to transfer the case to Ohio, Judge Will granted Skil's motion on condition that the case be transferred, *TO WHICH SKIL CONSENTED*, whereupon both motions were granted and the case was transferred to Ohio where it became Civil Action C69-461.

Subsequent to such transfer, the United States Supreme Court in *Lear v. Adkins*, 395 U.S. 653, reversed the long established doctrine that a licensee could not challenge the validity of the patent under which it was licensed. This reversal affected the summary judgment ruling made by Judge Will previous to the transfer. Judge Green did not wish to upset the ruling of Judge Will and, therefore, retransferred the case to Illinois for that purpose. After reconsidering and modifying his ruling in the light of *Lear v. Adkins*, Judge Will, acting on Lucerne's motion, retransferred the case to Ohio on September 24, 1970.

Upon return of this case, Judge Green by Supplemental Order dated November 5, 1970, consolidated all issues raised in Lucerne's Amended Counterclaim relating to Matthews with Civil Action C67-723 (first above mentioned). Skil then on December 8, 1970 filed suit in Illinois against two of Lucerne's customers viz. Rockwell Manufacturing Co. and Wen Products, Inc. for infringement

of Gawron. Lucerne on November 29, 1971, upon leave granted filed its Third Amended Answer and Counterclaim in Ohio Case C69-461 setting up defenses of collateral estoppel with respect to Gawron based on breach of written contracts by Skil and alleging that Lucerne is entitled to a royalty free license under Gawron; that said license agreement is still in full force and effect and cannot be cancelled by Skil unilaterally; that Skil has wrongfully and maliciously brought the new action in Illinois (Civil Action No. 70 C 2858); and praying for a Declaratory Judgment of nonfringement and invalidity of Gawron, and/or if Gawron is valid, that Lucerne has a paid-up royalty-free license thereunder.

On motion of Lucerne, Judge Lambros on February 29, 1972 enjoined Skil from proceeding with any case theretofore filed in which Lucerne is a party other than C69-461 with respect to any of the issues based upon alleged infringement of Gawron, Frenzel and "LICENSES GRANTED TO LUCERNE UNDER THE FOREGOING PATENTS DATED NOVEMBER 15, 1965 AND APRIL 11, 1967 RESPECTIVELY. Failing to obtain a stay order, Skil appealed to the Sixth Circuit Court of Appeals which affirmed the temporary injunction (see Appendix herein on page 1a). Skil's motion for rehearing was denied on June 6, 1972 and its petition for certiorari to this Court also was denied. Skil thereupon circumvented the injunction by dismissing Civil Action 70 C 2858 and filing the instant action in Illinois, which is identical to the dismissed action except for the addition of Millers Falls Company as the first named defendant so as to change the style of the case. This ploy was based on the language of the restraining order viz. "ANY ACTION HERETOFORE FILED" (See Appendix herein on page 1a). Since the injunction was issued on February 29, 1972, it could not

apply to the second case, which was filed on November 13, 1972. This necessitated a second injunction which was issued by Judge Lambros on February 13, 1973 enjoining Skil from proceeding in the case of *Skil Corporation v. Millers Falls Co.*, Case No. 72 C 2854 until further order of the court (See Appendix herein on page 4a).

Skil filed its Notice of Appeal to the Sixth Circuit Court of Appeals on March 15, 1972, and by motion obtained extension to transmit the record until June 13, 1973. The record was transmitted and the docket fee was paid on June 12, 1973, but the case was NEVER DOCKETED IN THAT COURT. By separate orders dated June 28, 1973 Judge Lambros dismissed the appeal, dissolved the injunction dated February 13, 1973 and ordered Case C69-461, exclusive of Lucerne's Counterclaim, transferred to the Illinois District. An appeal taken by Lucerne to the Sixth Circuit Court of Appeals was dismissed on motion of Skil.

Meanwhile, Judge Hoffman on July 31, 1973 ordered Case No. 72 C 2854 transferred to Ohio. Skil sought to prevent that transfer by filing a 174 page Emergency Petition for Writ of Prohibition and Mandamus in the Seventh Circuit Court of Appeals Case No. 73-1697 (see JA 1 pages 87 to 210 of record in Sixth Circuit Appeals Case No. 75-2291) to which Respondents filed their Joint Answer of 80 pages. After awaiting the decision of the Sixth Circuit Court in Case No. 73-1738, the Seventh Circuit Court of Appeals on December 28, 1973 denied Skil's Emergency Petition on the merits. On January 2, 1974 Skil moved for a stay of transfer and also for a reconsideration by the Court EN BANC. Both motions were denied on January 9, 1974. Skil filed yet another motion to stay transfer pending certiorari, which was also denied on January 16, 1974. Skil then filed a Motion for Stay with

Associate Supreme Court Justice William H. Rehnquist pending certiorari, who denied it on January 17, 1974. Skil did not file a Petition for Writ of Certiorari; but instead on February 19, 1974 moved the Ohio District Court to remand Case C74-121 to Illinois, which motion was denied by Judge Lambros on April 15, 1975 "after extensive consideration and evaluation of the issues presented by all parties" and Case No. C74-121 was consolidated with C69-461 for purposes of all pre-trial proceedings. On motion of Skil filed April 23, 1975, Judge Lambros entered an Amended Order on July 17, 1975 adding a certification. Lucerne's motion in opposition was denied and Skil's appeal was allowed by order of the Sixth Circuit Court dated September 17, 1975; which court by its decision affirmed the order of the Ohio District Court.

This lengthy history of proceedings makes little sense until it is considered in the light of Respondents' charges 1) that Skil's Gawron patent is invalid having been obtained by fraud and in breach of contract; 2) that Skil by threats of suit is collecting royalties from Lucerne's customers; and 3) that these proceedings are part of Skil's designed plan to prevent a trial on the validity of its Gawron patent at all cost.

ARGUMENT

I. The Questions Presented by Petitioner Are Spurious and Unrelated to the Issues in This Case.

The first two QUESTIONS PRESENTED certainly do not conform to the provisions of Rule 15(1)(c) of this Court viz. "The statement of the questions should be short and concise and should not be repetitious". The third QUESTION does not fall into any of the classifications set forth in Rule 19. The fourth QUESTION raises a false issue since Respondents never cited *Continental Grain Co. v. Barge FBL 585*, 364 U.S. 19 nor does that citation appear in the majority opinion of the Sixth Circuit Court of Appeals. The fifth QUESTION is irrelevant since that issue was decided by the Seventh Circuit Court of Appeals and Petitioner, having failed to appeal to this Court, is estopped from raising it again.

II. The Transfer Issue Is Res Judicata.

The first three QUESTIONS PRESENTED are based on the constantly repeated proposition that "a two sentence order, unaccompanied by a written opinion" cannot be a decision on the merits. No authorities are cited by Petitioner in support of this conclusion. This Court in the case of *Napa Valley Electric Co. v. R.R. Commission*, 251 U.S. 366, 64 L. Ed. 310, 40 S. Ct. 174 held otherwise. We quote from the opinion on page 373:

> "We agree with the District Court that 'the denial of the petition was necessarily a final determination . . . based on the identical rights' asserted in that court and repeated here. *Williams v. Bruffy*, 102 U.S. 248, 255. And further, to quote the District Court,

'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact'. *Calaf v. Calaf*, 232 U.S. 371; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299.

The court held, and we concur, that absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore, the decree of the District Court is Affirmed."

Moreover, "the two sentence order" is pretty explicit in its statement:

"On consideration of the plaintiff's emergency petition for writ of prohibition and mandamus, memorandum in support thereof and supplemental appendix filed August 2, 1973, and of joint answer of respondents filed August 23, 1973, It is ordered that said petition be, and the same is hereby DENIED."

We respectfully submit that "the full faith and credit" rule precludes any inference that the Seventh Circuit Court of Appeals did not do what it expressly said it did in its judgment entry. (*Williams v. North Carolina*, 325 U.S 226, 233, 236 (1945).)

III. Petitioner Is Estopped From Relitigating the Questions Presented Herein.

Furthermore Petitioner, after being denied its Emergency Motion for Stay of Proceedings Pending Application To The United States Supreme Court for a Writ of Certiorari by the Seventh Circuit Court of Appeals, and a like application by Mr. Justice Rehnquist of this Court,

failed to file a Petition for a Writ of Certiorari and thereby abandoned its appeal rights. Under such circumstances the language on page 189 of the opinion in *Angel v. Bullington*, 330 U.S. 183, 91 L. Ed. 832, 67 S. Ct. 657 (1947) becomes pertinent:

"If the litigant chooses not to continue to assert his right after an intermediate tribunal has decided against him he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. An adjudication of an issue implies that a man had a chance to win his case. The chance was necessarily afforded by the North Carolina litigation. It was in process of determination when the Supreme Court of North Carolina decided against him. He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. He cannot begin all over again in an action involving the same issues before another forum in the same state.

(5) It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. Such a situation is presented when the first decision is based not on the ground that the distribution of judicial power among the various courts of the state requires the suit to be brought in another court of the State, but on the inaccessibility of all courts of the State

to such litigation. And that is the essence of the present case. The only issue in controversy in the first North Carolina litigation was whether or not all the courts of North Carolina were closed to that litigation. The merits of that issue were adjudicated. And that was the issue raised in the second litigation in North Carolina—that in the federal district court. The merits of this issue having been adjudicated, they cannot be relitigated."

IV. Hoffman v. Blaski and Continental Grain Co. v. Barge FBL 585 Differentiated.

Hoffman v. Blaski, 363 U.S. 335 (1960) decided a very narrow issue as appears from this language on page 340 of the opinion viz.:

"Without sacrifice or slight of any triable position, the parties have in this Court commendably narrowed their contentions to the scope of the only relevant inquiry. The points of contention may be sharpened by first observing what is not in contest. Discretion of the district judge is not involved. Propriety of the remedy of mandamus is not assailed. No claim is made here that the order of the Fifth Circuit denying the motion of respondents in the Blaski case for leave to file a petition for writ of mandamus 245 F2d 737 precluded Judge Hoffman or the Seventh Circuit from remanding this case.

• • • • •

[342] Petitioner's 'thesis' and sole claim is that Section 1404(a) being remedial, Ex parte Collett, 337 U.S. 55, 71 should be broadly construed, and when so construed, the phrase 'where it might have been brought' should be held to relate not only to the time of bringing of the action, but also to the time of

the transfer; and that if at such time the transferee forum has the power to adjudicate the issues of the action, it is a forum in which the action might *then* have been brought." . . . "We do not agree."

This is neither the situation nor the issue in this case. Therefore, the cited case is not in point and is of no effect in the instant case.

Continental Grain Co. v. Barge FBL 585, 364 U.S. 19 (1960) was not cited or relied upon by Respondents herein nor does it enter into the decision of the Sixth Circuit Court in the instant case. The assertion on page 8 of the Petition clearly shows that this case was cited in the Seventh Circuit mandamus case. This proves that Petitioner is here seeking to relitigate a judgment which has become final through Petitioner's abandonment of its right of appeal. There is no issue in THIS case which relates to either of the authorities cited.

V. 28 U.S.C. Section 1404(a) Is Not Involved in This Case.

The decision sought to be appealed is that of the Sixth Circuit Court of Appeals affirming the order of the District Court which is set forth on page 24a of the Petition. That order denied Plaintiff's Motion to Remand. It is therefore clear that 28 U.S.C. Section 1404(a) cannot be involved since the order did not purport to transfer "any civil action to any other district". This again proves that Petitioner is not here seeking to appeal from the Sixth Circuit's judgment which affirmed the Ohio District Court, but is using this case to relitigate issues finally determined in the Seventh Circuit case.

VI. Justice Delayed Is Justice Denied.

The Gawron patent was issued on September 28, 1965. As stated in the Sixth Circuit Court opinion on page 2a of the Petition:

> "This litigation has been pending in various courts since 1968, with cases filed not only in Ohio and Illinois but also in the Southern District of New York and the District of Connecticut. Over the years cases have shuttled between the District Courts of Northern Ohio and Illinois by transfer and retransfer in a controversy over choice of forum, with the result that there has been no trial on the merits of the litigation. Various phases of the transfer litigation have been considered by District Judges Green and Lambros of Ohio, and by Judges Will and Hoffman of Illinois. This is the fourth appeal which our court has entertained.
>
> • • • • •
>
> We should put a stop to forum-shopping and bring to a close this protracted litigation over the forum."

CONCLUSION

Petitioner having failed to submit any undetermined or pertinent issues, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

REESE DILL
HENRY J. ZETZER
MERKEL, CAMPBELL, DILL & ZETZER
2150 Illuminating Building
Cleveland, Ohio 44113
(216) 523-1500

RICHARD J. EGAN
BALDWIN, EGAN, WALLING & FETZER
1430 Keith Building
Cleveland, Ohio 44115
Attorneys for Respondents

Of Counsel:
JAMES VAN SANTEN
HILL, GROSS, SIMPSON, VAN SANTEN,
STEDMAN, CHIARA & SIMPSON
70th Floor Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

APPENDIX

ORDER OF THE DISTRICT COURT

(Filed February 29, 1972)

No. C 69-461

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SKIL CORPORATION,
Plaintiff,

v.

LUCERNE PRODUCTS, INC.,
Defendant.

ORDER

LAMBROS, *District Judge*

In this case, the defendant Lucerne Products, Inc. ("Lucerne") has applied to the Court to enjoin the plaintiff Skil Corporation ("Skil") from proceeding with any action heretofore filed in which Lucerne is a party, other than the instant action, with respect to any of the issues relating to the following matters as raised in this lawsuit:

1. Patent No. 3,209,228 issued to Alex F. Gawron
2. Patent No. 3,260,827 issued to Carl J. Frenzel
3. Licenses granted by Skil to Lucerne under the foregoing patents dated November 15, 1965 and April 11, 1967 respectively.

The other action which Lucerne in essence seeks to enjoin Skil from proceeding is presently pending in the Northern District of Illinois, namely, *Skil Corporation v. Rockwell Manufacturing Company and Wen Products, Inc. v. Lucerne Products, Inc.*, Civil Action 70C2858. The issues raised there are essentially the same as those raised in the instant lawsuit. Further, Lucerne is in essence the real party in interest in that suit. The law is clear that in such a situation wherein the issues are essentially the same as well as the parties, the Court first acquiring jurisdiction should be allowed to proceed with it without interference from other courts under suits subsequently filed. See *Carbide & Carbon Chemical Corp. v. United States, Industrial Chemicals, Inc.*, 140 F.2d 47, 49 (4th Cir. 1944); *Milwaukee Gas Specialty Co. v. Mercoid Corp.*, 104 F.2d 589, 592 (7th Cir. 1939); *In re Georgia Power Co.*, 89 F.2d 218, 221 (5th Cir. 1937).

Since this Court was the first one to acquire jurisdiction over the issues, inasmuch as its jurisdiction will be seriously impeded and interfered with if the other action is permitted to proceed, since irreparable injury will result to Lucerne by forcing it to engage in multiple discovery proceedings simultaneously, inasmuch as Skil will not be injured by the granting of the injunction and since the granting of the injunction will result in the vast savings of judicial time and effort, the Court grants Lucerne's request for injunctive relief.

Accordingly, it is directed that during the pendency of this action, Skil, its officers, agents, employees, attorney or any other persons acting on its behalf are hereby restrained from proceeding with any action heretofore filed in which Lucerne is a party, other than the instant action, with respect to any of the issues based upon alleged infringement of the following letters patent and the licenses

specified in the Complaint and Supplemental Complaint herein, namely:

Patent No. 3,209,228 issued to Alex F. Gawron

Patent No. 3,260,827 issued to Carl J. Frenzel

Licenses granted by Skil to Lucerne under the foregoing patents dated November 15, 1965 and April 11, 1967 respectively.

As security, Lucerne shall post a $500.00 bond with the Clerk of Courts.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
United States District Judge

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT

(Filed February 13, 1973)

No. C 69-461

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SKIL CORPORATION,
Plaintiff,

v.

LUCERNE PRODUCTS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

LAMBROS, *District Judge*

On February 29, 1972, this Court issued an injunction restraining Skil Corporation ("Skil") from proceeding with any action theretofore filed in which Lucerne Products, Inc. ("Lucerne") was a party, other than the instant action, with respect to any of the issues based upon the alleged infringement of Patent No. 3,209,228 issued to Alex F. Gawron and Patent No. 3,260,827 issued to Carl J. Frenzel. This injunction encompassed the case of *Skil Corporation v. Rockwell Mfg. Co.*, Case No. 70C2858 which was pending in the United States District Court for the Northern District of Illinois, Eastern Division. The injunction was appealed to the Court of Appeals for the Sixth Circuit and was affirmed. The United States Supreme Court denied a petition for a writ of certiorari.

Thereafter, on November 13, 1972, Skil filed a suit in the United States District Court for the Northern District of Illinois, Eastern Division alleging that the defendants, Millers Falls Company, Rockwell Mfg. Co., The Power Tool Co. and Wen Products, Inc. had infringed its Gawron Patent, Patent No. 3,209,228. On the next day, November 14, 1972, the case of *Skil Corporation v. Rockwell Mfg. Co.*, Case No. 70C2858 was dismissed. On January 15, 1973, Lucerne moved this Court to amend the injunction issued on February 29, 1972 to include the recently filed case of *Skil Corporation v. Millers Falls Co.*, Case No. 72C2854. Lucerne, on February 9, 1973, was granted leave to intervene in the case of *Skil Corporation v. Millers Falls Co.* That case has been set for trial for February 21, 1973. After due consideration, the Court grants the motion of Lucerne to amend the injunction order of February 29, 1972 to encompass the case of *Skil Corporation v. Millers Falls Co.*

The law, as noted in this Court's order of February 29, 1972, is clear that in a situation where cases involve essentially the same issues and parties, the Court first acquiring jurisdiction should be permitted to proceed without interference by other courts under suits subsequently filed. See *Carbide & Carbon Chemical Corp. v. United States Industrial Chemicals, Inc.*, 140 F.2d 47, 49 (4th Cir. 1944); *Milwaukee Gas Specialty Co. v. Mercoid Corp.*, 104 F.2d 589, 592 (7th Cir. 1939); *In re Georgia Power Co.*, 89 F.2d 218, 221 (5th Cir. 1937). Applying this principle of law to this case, the Court finds that the case at bar and the case of *Skil Corporation v. Millers Falls Co.* essentially involve the same parties and issues. Accordingly, since this Court acquired jurisdiction first and inasmuch as the jurisdiction of this Court would be impeded if the case of *Skil Corporation v. Millers Falls Co.* be permitted to proceed, the Court

must enjoin Skil from proceeding in that case in the United States District Court for the Northern District of Illinois.

Besides preserving the jurisdiction of this Court, there is a further reason for granting the relief requested. The parties in the case at bar as well as others have been litigating the validity and infringement of several patents used in the power tool industry in this District Court, in the Northern District of Illinois, in the Southern District of New York and in the District of Connecticut. The time has come to bring order out of the chaotic situation which now exists. The time has come to place the cases in a position so that they will be expeditiously tried. This cannot be done if the litigants proceed in an unguided manner. In this regard, the Gawron patent is being litigated simultaneously both here and in the Northern District of Illinois. Conceivably, it as well as the Frenzel patent could be litigated in one forum—be it Cleveland or Chicago. The Court, however, requires time to decide if this can be done. Accordingly, with a view to save judicial time and to avoid a multiplicity of suits, the Court deems it advisable to place the situation in an hold position until such a determination can be made.

Accordingly, for the above reasons and for the ones given in this Court's order of February 29, 1972, this Court amends that order so as to enjoin Skil, its officers, agents, employees, attorneys or any other persons acting on its behalf from proceeding in the case of *Skil Corporation v. Millers Falls Co.*, Case No. 72C2854 until further order of this Court.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
United States District Judge